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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

No. 86 - 1476

RALPH KEMP, Warden,  
Georgia Diagnostic and  
Classification Center,

Petitioner,

v.

JOSEPH THOMAS,

Respondent

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RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITIONER'S PETITION FOR  
WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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REASONS WHY THE PETITION FOR  
WRIT OF CERTIORARI  
SHOULD NOT BE GRANTED

I.

AFTER FURTHER CONSIDERATION IN LIGHT OF ROSE  
v. CLARK, U.S. , 106 S.Ct. 3101  
(1986), THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED  
THAT THE UNCONSTITUTIONALLY BURDEN SHIFTING  
JURY INSTRUCTION IN THIS CASE IS NOT  
HARMLESS.

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STATEMENT OF THE CASE

In January, 1977, Respondent, Joseph Thomas, was convicted of murder, kidnapping and armed robbery in the Superior Court of Decatur County, Georgia and sentenced to death. On direct appeal, the Supreme Court of Georgia affirmed the convictions and sentences for murder and kidnapping but vacated the armed robbery conviction. Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977), cert. denied, 436 U.S. 914 (1978).

After exhausting state remedies, Respondent filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia, Thomasville Division. This petition was denied on July 17, 1981. On appeal, the United States Court of Appeals for the Eleventh Circuit remanded the

case to the district court for a limited evidentiary hearing.

Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).

On remand, the district court denied the petition.

On July 8, 1985, the Eleventh Circuit reversed the judgment of the district court and remanded the case with instructions to grant the Writ of Habeas Corpus. Thomas v. Kemp, 766 F.2d 452 (11th Cir. 1985).

On petition for writ of certiorari, this Court remanded this case to the Eleventh Circuit for further consideration in light of Rose v. Clark, 478 U.S. \_\_\_, 106 S.Ct. 3101 (1986). Kemp v. Thomas, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3325 (1986). On further consideration, the Eleventh Circuit held that the burden shifting jury instruction was not harmless and remanded the case to the district court with instructions to grant the Writ of Habeas Corpus. Thomas v. Kemp, 800 F.2d 1024 (11th Cir. 1986). Rehearing en banc was denied by the Eleventh Circuit on January 5, 1987.

REASONS WHY THE PETITION  
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In its prior opinion in this case, the Court of Appeals correctly held that the trial court's instructions to the jury at the guilt/innocence phase of Joseph Thomas' trial improperly shifted the burden of proof on the essential element of intent. The trial court instructed the jury on the essential element of intent as follows:

A crime is a violation of a statute of this State in which there shall be a union or joint operation of act or emotion [sic] to act, an intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be a product of the person's will, but that the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but this presumption may be rebutted.

A person will not be presumed to act with criminal intent, but the trial facts [sic], and you are the trier of facts in this case, may find such intention upon considering the words and conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. Every person is assumed to be of sound mind and discretion. But the presumption may be rebutted. A specific intent to commit the crime charged in each of these indictments, in each count thereof, is an essential element that the State must prove beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. The intent may be shown in many ways, provided the jury find beyond a reasonable doubt that it existed from the evidence produced before you.

(T Trial Vol. 4 at 79-80) (emphasis added).

Thomas v. Kemp, 766 F.2d at 454-455.

This instruction is virtually identical to the instruction which this Court found to be unconstitutionally burden-shifting in Francis v. Franklin, 471 U.S. \_\_\_, 105 S.Ct. 1965 (1985). As Judge Roney, writing for the panel, correctly held:

The State argues that any constitutional infirmity in the above instructions was cured by the general instructions that the defendant is presumed innocent and that the State bears the burden of proof to prove each element beyond a reasonable doubt. Such an argument is foreclosed by Franklin v. Francis, \_\_\_ U.S. at \_\_\_, 105 S.Ct. at 1974. Neither is the defect corrected by the more specific instruction that '[a] person will not be presumed to act with criminal intent, but the [trier of] facts, and you are the trier of facts in this case, may find such intention upon considering the words and conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.' See Francis v. Franklin, \_\_\_ U.S. at \_\_\_, 105 S.Ct. at 1974-1976; Drake v. Kemp, 762 F.2d at 1453; Tucker v. Kemp, 762 F.2d at 1501; Davis v. Kemp, 752 F.2d at 1517-19.

A review of the entire jury charge in light of Francis v. Franklin and this Court's en banc decisions compels the conclusion that Thomas jury instruction violates Sandstrom v. Montana, 442 U.S. 510 (1979).

Thomas v. Kemp, 766 F.2d at 455.



The State argues in its current petition for writ of certiorari that intent is not an element of felony-murder in Georgia. This is flatly wrong. As the Court of Appeals correctly held in its prior opinion in this case:

In Georgia, felony murder requires a finding that the defendant killed the victim while intentionally committing another felony, or that a co-participant killed the victim while the defendant and the co-participant were intentionally committing another felony. See O.C.G.A. §16-5-1(c) . . . Intent is an essential element of the armed robbery charge underlying the felony murder conviction [in Respondent's case]. O.C.G.A. §16-8-41(a).

Thomas v. Kemp, 766 F.2d at 454.

The Court of Appeals, on remand from this Court, carefully analyzed the issue of harmless error in Respondent's case in light of this Court's decision in Rose v. Clark, *supra*. The Court of Appeals held:

We have reviewed the record as a whole in this case in light of Rose v. Clark, 478 U.S. \_\_\_, and hold that it cannot be said beyond a reasonable doubt that the improper instruction here had no effect on the jury verdict. . . . The defense at trial . . . reasoned that the acts themselves were insufficient to establish intent because Thomas was under the influence of drugs at the time they were committed, and thus was incapable of forming the intent to do those acts.

This framed the issue for the jury, with testimony from a State psychiatrist that would support the defense in psychiatric theory. Thomas testified about the use of drugs. The trial court charged the jury that if one's mind was so impaired that he was incapable of forming an intent to do the act charged, he would not be criminally responsible for the act. . . .

This problem would face the jury: who has the burden of proof on the issue. The law places the burden on the state to prove that Thomas had the required intent to support a capital murder charge. [cite omitted] If the jury simply could not decide whether he was so drug-influenced as to be incapable of intent, the state should lose on that issue. According to Sandstrom, however, the charge given would shift the burden on this crucial issue to Thomas, suggesting to the jury if they could not decide what was true on the point, the state should win. [Footnote omitted].

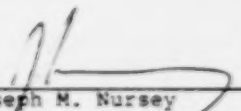
Thomas v. Kemp, 800 F.2d at 1025-1026.

Georgia law recognizes that intoxication which renders a defendant incapable of forming intent is a defense and the burden of proof rests with the State to prove the requisite intent beyond a reasonable doubt. See, e.g., Pope v. State, 256 Ga. 196, 345 S.E.2d 831, 843-44 (1986). The Eleventh Circuit carefully reviewed the harmless error issue and articulated the basis of its decision. As this Court stated in Francis v. Franklin, 105 S.Ct. at 1977, n. 10, "[t]he primary task of this Court upon review of a harmless-error determination by the Court of Appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." The Court of Appeals carried out that obligation in this case.

CONCLUSION

Respondent, Joseph Thomas, prays that the Warden's petition for writ of certiorari be denied.

Respectfully submitted,

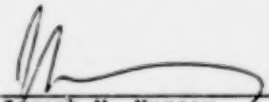
  
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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 13th day of April, 1987.

  
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